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No. 08-1065

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

CURTIS W. MCGHEE JR.
AND TERRY J. HARRINGTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents seek a new constitutional "right not to be framed." But they do not seriously argue that such a right can be divined from this Court's precedents. In fact, the Constitution does not guarantee a fair investigation before a prosecution is commenced. Nor does the Constitution "guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released." *Baker* v. *McCollan*, 443 U.S. 137, 145 (1979).

None of respondents' allegations has been established and, as explained in Part I, *infra*, their brief takes considerable liberties with the record. But even if respondents' allegations were true, petitioners' alleged pre-trial conduct did not inflict any injury that the Constitution recognizes and thus does not support a § 1983 cause of action. As this Court has explained, "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry* v. *Johnson*, 467 U.S. 504, 511 (1984). In this case, that deprivation occurred at trial.

A prosecutor's absolute immunity in judicial proceedings means, at the most basic level, that a prosecutor may not be sued because a trial has ended in conviction. Yet that is what happened here. Respondents avoided what should have been quick dismissal of their wrongful conviction claims by proffering a novel end-run around absolute immunity. Rather than alleging use of false testimony at their trials, which would have required dismissal under *Imbler*, respondents claimed that their rights were violated

during the earlier investigation. Persuaded that this case was about *qualified* immunity, the courts below allowed the claims to go forward under a theory of "substantive due process."

Absolute immunity cannot be evaded by attempting to relocate the operative constitutional injury from trial to investigation in this fashion. Respondents' complaints devote more than 20 pages to the pre-arrest investigation and only a few scattered paragraphs to their trials. Injuries that occur during an investigation are subject to qualified immunity. But respondents did not file suit to reform criminal investigations or vindicate a right to due process in the abstract. As they told the district court after petitioners were denied summary judgment, "Harrington and McGhee seek to recover *damages for an unconstitutional conviction* and resulting imprisonment." McGhee Dist. Ct. Docket No. 228, Attachment 1, at 2 (emphasis added). Success on their claims, they said, necessarily would "impugn[] the validity of their convictions." *Id.* at 7. By their own admission, respondents' injuries occurred at trial, and thus the relevant immunity is the absolute immunity of a prosecutor in judicial proceedings.

Contrary to the claims of respondents and their *amici*, correcting the erroneous decisions below would not "expan[d]" or "exten[d] the reach" of prosecutorial immunity. Ctr. Admin. Crim. L. Br. 3. It would not disturb *Buckley*'s principle that police and prosecutors get the same protection—qualified immunity—when their functions are the same. It would simply reject the legal fiction that where a wrongful conviction occurs at trial, liability can be pinned to some earlier event outside the judicial process. Such an analysis cannot be reconciled with *Imbler*. It is

not possible to uphold absolute immunity in principle while allowing a suit to go forward in which the plaintiffs expressly seek "damages for an unconstitutional conviction."

Although this Court reaffirmed both the principle and rationale for absolute immunity in a unanimous decision last term in *Van de Kamp*, respondents and their *amici* seek to use this case to "advanc[e] qualified, not absolute, immunity as the better and more workable standard to apply" in cases like this one. Ctr. Admin. Crim. L. Br. 2. Respondents believe that if they push their factual allegations to center stage, the Court might be persuaded to create a special exemption from *Imbler* for especially sympathetic plaintiffs.

Given the legal confusion, massive expense, and handicaps to law enforcement that such an outcome would produce, the United States, along with a geographically and politically diverse group of 28 states and the District of Columbia[1] as well as the major national organizations representing district attorneys, federal prosecutors, and state and local governments, urge this Court to overturn the decisions below. Otherwise, as the United States explains, "plaintiffs barred under *Imbler*" would simply do what respondents did here: "draft their complaint to refer to the prosecutor's investigation and preparation of the case instead of his activity at trial." SG Br. 5. Accordingly, the decisions below should be reversed.

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[1] In addition to the 27 states listed on the cover of the brief, the State of Wisconsin informed the Court and parties by letter on July 21, 2009, that it also joins the brief.

I. RESPONDENTS MAY NOT SEEK A NEW LEGAL RULE WITH A DISTORTED ACCOUNT OF THE RECORD.

Recognizing the weakness of their legal position, respondents have chosen to stress their factual allegations—their story of a malicious "frame-up." This is an interlocutory appeal from denial of summary judgment, and thus respondents were entitled to have the courts below view the record in the light most favorable to them. But respondents are *not* entitled to use a distorted and incomplete account of the record to argue for a new interpretation of the Due Process Clause, or to seek a special rule abrogating immunity because they have "allege[d] dozens of pages of detailed facts" in a way they say "[m]ost would-be plaintiffs w[ould] be unable to." Resp. Br. 42, 51. Before turning to the legal and policy arguments raised by respondents and their *amici*, we therefore briefly address respondents' factual recital.

The core of respondents' story is that Hrvol and Richter "abandon[ed] their pursuit of the real suspect"—that is, Charles Gates, the so-called "spooky type individual" who walked dogs—so that they could "frame Harrington and McGhee—two African-American teenagers from across the state line." Resp. Br. 8-9, 17. But the district court did not credit such an account, because it is not what respondents argued below. The record shows that it was the Council Bluffs police, not petitioners, who dropped Gates as a suspect weeks before Harrington or McGhee came to anyone's attention in Pottawattamie County. According to Harrington's version of the facts in the proceedings below, the investigation focused on Gates from July 23 to August 12, 1977. Harrington C.A. App. 83. The last investigative report focusing on

Gates is dated August 12, 1977. J.A. 33. It was not until several weeks later that Nebraska authorities investigating car thefts initiated the contact with Council Bluffs police that eventually brought Harrington and McGhee to their attention. As Harrington himself told the Eighth Circuit, the "first [t]ime Harrington is mentioned" in any police report is September 9, 1977. Harrington C.A. App. 83. Respondents' more dramatic account—that petitioners "abandon[ed] their pursuit of the real suspect" because they preferred to "frame" Harrington and McGhee—is both inflammatory and unsupported by the record. Moreover, their suggestion (at 8) that Gates was dropped as a suspect because he was white and related to a local fireman is rank speculation with no support whatsoever.

Respondents assert that Harrington and McGhee were implicated by nothing more than the unreliable statements of Kevin Hughes, whom petitioners allegedly coached to serve as their "mouthpiece," and claim that "[n]o evidence corroborated" the account of the Schweer murder that Hughes provided to Council Bluffs police. Resp. Br. 4-9. But respondents completely fail to mention facts of record that would have given Hrvol and Richter good reason to believe they were pursuing a valid investigation and a legitimate prosecution.

For example, after Hughes was picked up in early September driving a stolen car, Omaha police—against whom no misconduct has been alleged—independently spent weeks investigating Harrington and McGhee's involvement in the same car-theft ring and issued warrants for their arrests. See McGhee Dist. Ct. Docket No. 111, Attachment 1, at 78-86. The district court acknowledged this as well. See Pet.

App. 59a ("Hrvol and Richter argue that three separate Nebraska law enforcement entities independently suspected and investigated Harrington and McGhee in a car theft ring"). Based on a number of interviews—including an interrogation of Harrington after he was arrested on the car-theft warrant—two Omaha investigators concluded on October 2, 1977, that, in their "strong opinion," Harrington and McGhee, among others, had "direct or indirect knowledge" about the Schweer murder, and that Schweer had been shot "by persons who were attempting to steal an automobile." McGhee Dist. Ct. Docket No. 111, Attachment 1, at 86.

On October 6, 1977, a week after the Hughes statement that respondents describe as "riddled with mistakes," Resp. Br. 6-7, McGhee gave his own statement to Omaha police. McGhee Dist. Ct. Docket No. 124 at 52-81. McGhee admitted that around the time of the Schweer murder in late July, he, Harrington, and two other friends traveled to McIntyre Oldsmobile, the same dealership where Schweer worked. McGhee said the other men planned to obtain keys through a key-switch scheme, then "come back at night and get em a car." *Id.* at 56-58, 74. McGhee also said Harrington carried a shotgun in his trunk, which he had once pulled on McGhee, and that Harrington had "some evil ways." *Id.* at 64-68. When Harrington would "get mad," then "[t]he first thing, he'll be ready to do is go to that trunk [and] snap that gun out." *Id.* at 69. McGhee denied any personal involvement in the Schweer murder. *Id.* at 80. Omaha officer Robert Weise recounted this

statement at McGhee's criminal trial, and the relevant portion is reproduced in the Addendum hereto.[2]

Respondents say Hughes was the "centerpiece of the State's case." Resp. Br. 10. But more than 45 witnesses testified at the two trials. Further, it is undisputed that Harrington and McGhee had full opportunity to impeach Hughes. As one of Harrington's post-conviction counsel characterized it, Harrington's defense attorney "thrashed [Hughes] in front of the jury with his prior inconsistent statements" in "a long, thorough cross-examination." McGhee Dist. Ct. Docket No. 133, Attachment 3, at 540. Although respondents seek "damages for an unconstitutional conviction," their brief and pleadings never come to grips with what happened at those trials. Nor did the district court, because it erroneously focused on the investigation rather than the actual convictions.

No court has held that respondents' trials were unfair due to fabricated or perjured testimony. The Iowa Supreme Court found that Harrington's trial was compromised by an unrelated *Brady* violation and expressly declined to reach other issues. *Harrington*, 659 N.W.2d at 516-517. Moreover, contrary to the misrepresentations of respondents and their *amici*, petitioners have not "admitted" the allegations in this case as facts, and the district court rejected those characterizations. J.A. 77-82. The allegations are taken as true *only* for the purpose of resolving petitioners' immunity claims. *Ibid.* Were this

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[2] A federal court may take judicial notice of state criminal proceedings on which a § 1983 claim is based. *E.g.*, *Logsdon* v. *Hains*, 492 F.3d 334, 338 n.1 (6th Cir. 2007).

case to go to trial, petitioners would vigorously challenge them.

Given the posture of this case, it is neither possible nor appropriate to draw conclusions about how the Schweer murder investigation unfolded. It is one thing to say the district court accepted respondents' view of the record, and quite another to argue, as respondents do here, that their factual allegations should compel this Court to rewrite its Due Process Clause jurisprudence or create a special exception to *Imbler*. Respondents' selective and sensationalized account should not distract this Court from the question presented, nor prevent it from reversing the erroneous decisions below.

II. RESPONDENTS' ALLEGED CONSTITUTIONAL INJURIES OCCURRED IN THE JUDICIAL PROCESS.

The issue in this case is not whether respondents were deprived of a constitutional right. If they were convicted because perjured testimony was introduced at their trials, those convictions would have violated the right to a fair trial and would be subject to reversal. The issue, rather, is whether the courts below failed to apprehend the "location of the injury." *Buckley*, 509 U.S. at 271-272.

This Court has explained that "[p]rocedural due process guarantees only that there is a fair decision-making process before the government takes some action directly impairing a person's life, liberty or property." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 375 (6th ed. 2000). In a criminal proceeding, that "decision-making process" is the trial; accordingly, freedom from conviction based on perjured testimony is a trial right. See *Pyle*, 317 U.S.

at 216; *Mooney*, 294 U.S. at 112. Even where police or prosecutors "extort[]" testimony "from a witness by violence and torture," due process protects the accused person "against a *conviction* based upon such testimony." *Hysler* v. *Florida*, 315 U.S. 411, 413 (1942) (emphasis added); see also Mitchell P. Schwartz, Comment, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1119 (2003) ("police violate no federal right simply by fabricating a confession"; constitutional rights are implicated "once that fabricated confession is used in a criminal proceeding").

Respondents ask the Court to recognize a *new* right against fabrication, or as they call it, a "right not to be framed by the government." Resp. Br. 28. As respondents describe it, this new right would be independent of conviction, damages, or any deprivation of liberty whatsoever; it would apply regardless of whether testimony was used *at all* in any judicial proceeding. See *id.* at 24-25. Respondents do not seriously argue that there is a hint of such a right in this Court's jurisprudence. The core section of their brief on this point is devoid of a single citation to the Court's criminal procedure cases. See *id.* at 22-27. This fanciful argument cannot salvage their wrongful conviction claims.

A. There Is No Freestanding Constitutional "Right Not To Be Framed."

A "right not to be framed," independent of conviction or some other deprivation of liberty, may be an interesting policy proposal. But in interpreting § 1983, this Court has emphasized that its "role is * * * not to make a free-wheeling policy choice." *Malley*, 475 U.S. at 342. There is no history or tradition establishing a right to be free of improper investiga-

tion in the abstract. Allegations that are "horrible" or "'undeniably tragic'" do not suffice to create previously unrecognized due process rights, and "[t]he creation of a personal entitlement to something as vague and novel" as a right not to be framed "cannot simply g[o] without saying." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 751, 755, 766 (2005) (bracketed alteration in original). The proposed right on which respondents rely is so foreign to this Court's jurisprudence that there is no analogous rule from which it could even be inferred.

The first problem is that it is the Fourth Amendment, not the Due Process Clause, that regulates "pretrial deprivations of liberty." *Albright*, 510 U.S. at 274. The Fourth Amendment prohibits unreasonable searches and seizures; it does not provide a field manual for criminal investigations. Respondents acknowledge that their arrest warrants were issued pursuant to preliminary informations "signed by a detective and approved by Richter and Hrvol" in their capacities as prosecutors. Resp. Br. 10. Moreover, a Fourth Amendment claim for false arrest may not be leveraged into an action for wrongful prosecution, since at common law the two torts were "'entirely distinct.'" *Wallace* v. *Kato*, 549 U.S. 384, 390 (2007).

Investigative acts in and of themselves do not implicate an accused person's due process rights. For example, where police obtain evidence against a defendant by illegally searching a third party's property, the third party might have a Fourth Amendment claim, but the defendant's own due process rights are not violated; he is "is aggrieved * * * *only through the introduction* of [the] damaging evidence." *Rakas*, 439 U.S. at 134 (emphasis added). Nor does a suggestive

preindictment identification procedure inherently intrude on a constitutionally protected interest. *Manson*, 432 U.S. at 113 n.13. In a case involving the murders of three children, this Court rejected the notion of a due process right to a particular standard of care or diligence by officers investigating a crime. *Castle Rock*, 545 U.S. at 768. Even where an investigation culminates in an information based on flawed evidence, there is no due process right "to be free from prosecution except on the basis of probable cause." *Albright*, 510 U.S. at 272 (plurality opinion).

Respondents (at 21) compare the conduct alleged in this case to *Rochin*, where police officers had a suspect's stomach pumped to gain evidence for a prosecution. But *Rochin* does not help respondents. In that case the Court said its concern was the impact that such conscience-shocking tactics had on "the *proceedings by which this conviction was obtained*." 342 U.S. at 172 (emphasis added). As Justice Frankfurter further explained, "[e]ven though the concept of due process of law is not final and fixed, [its] limits are derived from considerations that are fused in the whole nature of our *judicial process*." *Id.* at 170 (emphasis added).

Respondents argue (at 24-25) that fabrication violates a constitutional right even where a suspect pleads guilty without trial. But that radical notion could create grounds for direct appeals or habeas claims in circumstances where this Court has rejected similar theories because they would hamper investigation of violent crimes. It is settled, for example, that a confession elicited by reference to nonexistent evidence or other deceit does not violate the Constitution if it is otherwise voluntary. See, *e.g.*, *Oregon* v. *Mathiason*, 429 U.S. 492 (1977) (per cu-

riam) (upholding confession following officer's false statement that defendant's fingerprints were found at the crime scene); *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969) (police misrepresentation of co-defendant's statements did not render confession inadmissible).

A suspect who is coerced into providing a truly involuntary confession is more directly affected by improper investigative tactics than a person who is unknowingly the target of efforts to fabricate testimony against him. Yet eliciting a false confession does not violate the Fifth Amendment unless the confession is introduced at trial. *Chavez*, 538 U.S. at 767 (plurality opinion).[3] As *amici* state and local government organizations explain (at 23), "[t]he fact that an investigation utilizes tactics that create a threat to the right to fair trial is not enough to violate due process; the critical constitutional question is whether the ensuing trial is fair."

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[3] Respondents' *amicus* Black Cops Against Police Brutality suggests (at 19-21) that *Chavez* stands for the principle that an improper criminal investigation may give rise to a due process claim "whether or not trial follows." This characterization is misleading and confuses the two separate holdings in *Chavez*. Although the Court held that the plaintiff could not bring a Fifth Amendment claim because his confession was never introduced, it also held that he could proceed with a substantive due process claim against the interrogating officer for "torturous methods" and "brutal" conduct during the interrogation. 538 U.S. at 783-784 (Stevens, J., concurring in part and dissenting in part). This physical abuse worked a deprivation of liberty independent of judicial proceedings. There is no similar allegation in this case.

B. A Due Process Violation Requires A Deprivation Of Liberty, Not Merely A Prosecutor's "Intent" To Use False Evidence In The Future.

By its plain words, the Due Process Clause applies where government action deprives an individual of "life, liberty, or property." U.S. CONST. amend. XIV, § 1. Without such a deprivation, there is no basis for inferring a "right not to be framed." A right to an investigation that is performed according to certain standards, apart from any deprivation of liberty, would be "an entitlement to nothing but procedure—which we have held inadequate even to support standing." *Castle Rock*, 545 U.S. at 764. What liberty interest were respondents deprived of by petitioners' investigation other than the arrests that followed the immunized filing of criminal informations or the trials where petitioners functioned as advocates? Respondents have no answer. As courts have observed, a defendant has no § 1983 cause of action if police or prosecutors fabricate witness testimony and then tuck it away in a drawer unused. *Buckley II*, 20 F.3d at 795; *Landrigan* v. *City of Warwick*, 628 F.2d 736, 744 (1st Cir. 1980).

Respondents argue that this hypothetical is not relevant here because petitioners "intend[ed]" to use the information against specific suspects. Resp. Br. 23. But a prosecutor's intent or state of mind—the "circumstances and motivations" behind the prosecution—are irrelevant where a claim involves alleged use of false evidence at trial. *Imbler*, 424 U.S. at 419 n.13. Otherwise, fact-bound questions of intent would frustrate the very purpose of absolute immunity: to "defeat[] a suit at the outset." *Ibid.* A prosecutor does not deprive a person of liberty by "intending"

to use evidence at some point in the future. In *Imbler*, this Court attached no significance to the petitioner's allegation that the prosecutor had engaged in a "conspiracy" with police prior to his charging and conviction. See *id.* at 416. The prosecutor's use of false evidence at trial was the "gravamen" of the petitioner's claim. *Ibid.*

There is no scienter test for absolute immunity, and thus immunity is not defeated by allegations about a prosecutor's state of mind. This principle was established more than 80 years ago in *Yaselli*, in which the Court upheld immunity for a prosecutor who conspired to have himself appointed so that he could wrongfully prosecute the plaintiff. It would be hard to imagine a more extreme example of prosecutorial malice. Yet this Court summarily affirmed the Second Circuit's ruling that, since a prosecutor has immunity even where he acts "willfully and maliciously" as an advocate, he also has immunity where he schemes in advance "*in order* to act willfully and maliciously. * * * We are unable to distinguish between the two cases in principle." 12 F.2d at 407 (2d Cir. 1926), summarily aff'd, 275 U.S. 503 (1927) (emphasis added).

Some of respondents' *amici* call it "hypertechnical" to argue that actual use of evidence, not just fabrication, is necessary for a cause of action. Crim. Def. Lawyers Br. 8. But there is no such thing as a constitutional tort without a cognizable injury. Respondents cite *Carey* v. *Piphus* for the proposition that a criminal defendant may sue under the Due Process Clause even where he has suffered "no damages" at all. Resp. Br. 25. But this Court has never recognized such a principle in criminal procedure cases. In *Carey*, the Court held that because the

guarantee of procedural due process has intrinsic value, a public school student could sue for nominal damages based on his distress at having been suspended without a hearing. 435 U.S. at 264; see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 732 (2d ed. 1988) ("At the core of the procedural due process right is the guarantee of an opportunity to be heard"). But in this case respondents were not denied the right to be heard. Defense counsel had full opportunity to examine and impeach the state's witnesses at trial, and respondents have not established that these witnesses' alleged perjured testimony caused their convictions. An investigation is not a government "process" in which a suspect has the right to be heard. And an investigation cannot, in itself, deprive a suspect of liberty or property. Only a trial or other judicial proceeding can do so.

C. Respondents Have No Substantive Due Process Claims.

The courts below characterized the alleged fabrication of evidence in this case as a violation of substantive due process. For their part, respondents tiptoe around this label, invoking substantive due process by implication when they say that petitioners engaged in "conscience-shocking misconduct." Resp. Br. 25; see also *id.* at 21 n.6 (calling the difference between procedural and substantive due process "beside the point here"). At any rate, respondents' claimed "right not to be framed" is baseless under substantive due process as well.

As with procedural due process, a fundamental element of a substantive due process claim is a deprivation of liberty. LAFAVE ET AL., CRIMINAL PROCEDURE at 88 (to establish a substantive due process claim, "the governmental action * * * must deprive

the individual of a liberty interest that history and tradition establish as entitled to due process protection"). As discussed above, respondents were not deprived of any liberty from an investigation, and there is no history or tradition that would support such a claim. Pressure tactics applied to third-party witnesses do not implicate substantive due process because they do not deprive the defendant of any liberty interest. *Conviction* based on the known *perjury* of such witnesses is "conscience-shocking" and for this reason has long been recognized as an archetypal due process violation. But characterizing fabrication of evidence as a substantive due process violation simply circumvents the rigorous analysis required by this Court's precedents.

D. The New Right Respondents Seek Would Inappropriately Interject Federal Courts Into State Criminal Procedure.

Respondents' claimed right not to be framed cannot be reconciled with this Court's longstanding approach to state criminal procedure. The Court has stressed its "continuing reluctance to treat the Fourteenth Amendment as a font of tort law." *Castle Rock*, 545 U.S. at 768 (internal quotation marks omitted). In formulating criminal procedure rules under the Due Process Clause, the Court has been exacting, because "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling* v. *United States*, 493 U.S. 342, 352 (1990). "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful bal-

ance that the Constitution strikes between liberty and order." *Medina* v. *California*, 505 U.S. 437, 443 (1992).

Respondents say "[i]t is difficult to imagine that a constitutional line is not crossed the moment that investigators shift their focus from solving a crime to framing an innocent citizen." Resp. Br. 26-27. Yet they do not explain how a court could determine when such a "shift" occurred or line was crossed. A basic requirement of § 1983 is that "[t]he contours of [a] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. How would a court reliably determine years later whether an aggressive witness interview crossed the line to coercion or subornation of perjury? As *amici* States note (at 18), "[t]he line between permissible inducements and impermissible coercion is * * * often a difficult one to draw," especially where an investigation involves accomplices or other reluctant witnesses.

This Court is not "a rule-making organ for the promulgation of state rules of criminal procedure." *Kansas* v. *Ventris*, 129 S. Ct. 1841, 1847 n.* (2009). In the absence of an established constitutional guarantee, such as the right against unreasonable search or seizure, it has declined to promulgate tests for "reasonable" conduct by criminal investigators, because "the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases." *Dunaway* v. *New York*, 442 U.S. 200, 213 (1979). Moreover, "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to ex-

ercise substantial deference to legislative judgments in this area." *Medina*, 505 U.S. at 445-446.

Such deference is especially warranted here. Based on experience, the 28 *amici* States argue that affirmance in this case would make prosecutors more reluctant to participate in pre-charge investigations, depriving both the public and defendants of the benefits of such participation. States Br. 5-15.

In summary, there is no cause of action for fabrication of evidence. The right not to be convicted based on false evidence is a trial right, subject to ordinary trial immunities.

III. THE ABSOLUTE IMMUNITY OF PROSECUTORS, NOT THE QUALIFIED IMMUNITY OF POLICE OFFICERS, APPLIES TO PETITIONERS' DECISION TO UNDERTAKE A PROSECUTION.

Respondents and their *amici* argue that for purposes of immunity, petitioners should be treated as police officers rather than prosecutors. See Resp. Br. 27-37. Their theory is that fabrication of evidence caused a constitutional injury. Police would be liable for such fabrication under § 1983, they claim, and so petitioners should be liable as well. This argument is erroneous because it misperceives the basis for liability when alleged fabricated evidence leads to the filing of charges and a later conviction.

A. Since A Prosecutor Cannot Be Held Primarily Liable For A Prosecution, He Cannot Be Held Vicariously Liable.

As an initial matter, there is no authority holding that police officers may be sued under § 1983 for fabrication of evidence without regard to the use of that evidence. As discussed above, there is no frees-

tanding constitutional "right not to be framed." It is only the decisions a prosecutor makes in initiating and conducting a prosecution that have the potential to deprive a criminal defendant of liberty.

As the United States explains, a police officer is not liable for a wrongful conviction because the act of fabrication itself is a constitutional violation, or because it is somehow foreseeable that fabricated evidence may cause a later conviction. Rather, an officer "is liable because the introduction of the fabricated evidence at trial is a constitutional violation, and even though he personally did not commit this violation, his earlier act of fabrication was its animating force," thus making the officer "an appropriate person to bear responsibility." SG Br. 20-21. In other words, the officer may be held liable because his fabrication drove the initiation of criminal proceedings.

The common-law analogy to this sort of misconduct is malicious prosecution, for which a police officer could be held liable under a form of vicarious liability known as "procurement." But "[i]t is both a misuse of language and a misunderstanding of doctrine to speak of a prosecutor procuring his own institution of proceedings; he in fact initiated the proceedings, rather than procuring them." SG Br. 21. The prosecutor is, of course, immune for initiating proceedings. Thus, "[t]o impose a form of vicarious liability for it, when the law chooses not to impose direct liability, would be anomalous." *Id.* at 21-22. "[P]rocurement liability for malicious prosecution exists to assign liability to a blameworthy person for wrongful institution of a proceeding actually performed by another. The theory is irrelevant when the blameworthy person and the initiator of the proceeding are one and the same." *Id.* at 29. As the Solicitor

General aptly puts it, in a case of malicious prosecution, the police officer in effect "stands in the shoes of the prosecutor"; but the prosecutor, who is immune for initiating the proceedings, "*already* stands in his own shoes." *Id.* at 26, 29.

Respondents argue (at 28) that "conduct, not the identity of the state actor, drives the constitutional analysis." But that overlooks the fact that a prosecutor has absolute immunity when he engages in the "conduct" of initiating a wrongful prosecution, while a police officer does not when procuring such a prosecution. Moreover, this case does not involve a police officer (or even a fellow prosecutor) who deceived an unknowing prosecutor; fabricating evidence "does not constitute a procurement" where, as here, the decision to file charges was left to the prosecutor's "uncontrolled choice." RESTATEMENT (SECOND) OF TORTS § 653 cmt. d (1977).[4] In short, a "prosecutor's pretrial fabrication is part and parcel of the wrongful initiation of proceedings on which tort liability is predicated—and for which the prosecutor is absolute immune." SG Br. 31.

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[4] Contrary to respondents' unsupported assertion, it is not settled that a fabricator of evidence is liable under § 1983 "regardless of whether he deceives the trial prosecutor into using the phony evidence, coerces the trial prosecutor into using it, or conspires with the trial prosecutor." Resp. Br. 33. See, *e.g.*, *Wray* v. *City of New York*, 490 F.3d 189, 193-195 (2d Cir. 2007) (prosecutor's decision to offer evidence, derived from an impermissibly suggestive identification procedure, defeated claim against officer); *Yarris* v. *County of Delaware*, 465 F.3d 129, 143 (3d Cir. 2006) (detectives not liable for prosecutor's decision to use evidence obtained through impermissible interrogation techniques, even though prosecutors were also complicit).

Respondents do not seriously contest the Solicitor General's analysis. Their suggestion that procurement is a species of "inchoate," rather than vicarious, liability is supported by nothing more than a citation to one case that had nothing to do with the criminal process. See Resp. Br. 34 n.11 (citing *Pinkerton* v. *United States*, 328 U.S. 640, 647 (1946)). Nor did *Thomas* involve any claim of prosecutorial immunity. See *id.* at 37 (discussing 734 F.2d 185 (5th Cir. 1984)). *Thomas* simply anticipated this Court's later decision in *Malley* that, where a reasonable officer knows an arrest warrant application is defective, the application is not immunized by a magistrate's subsequent issuance of the warrant.

B. Correcting The Erroneous Ruling Below Would Not Give Prosecutors Greater Immunity Than Police Officers For The Same Functions.

The *Buckley* Court would not have allowed claims like those in this case to survive. *Buckley* stressed that an allegation of fabricated evidence does not affect the "tradition of immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not." 509 U.S. at 274 n.5. As the United States observes, in *Buckley* "every Member of this Court suggested that the distinction between the preparation and the use at trial of fabricated evidence has constitutional significance." SG Br. 15. *Buckley* reserved the question whether the plaintiff could state a cause of action for fabricated evidence (on remand, the Seventh Circuit held he could not) and said that immunity for *use* of that same evidence at trial was consistent with "traditional principles of absolute immunity." 509 U.S. at 267 n.3. Importantly, *Buckley* warned that cause of

action and immunity should not be "conflate[d]." *Id.* at 274 n.5.

In evaluating "whether a complaint has adequately alleged a cause of action for damages" that is not barred by immunity, it is the "location of the injury" that is "relevant." *Buckley*, 509 U.S. at 271-272. Here the alleged injury occurred at trial. Regardless of any additional conduct, absolute immunity bars suit where, as here, a "prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim." *Van de Kamp*, 129 S. Ct. at 862. Respondents' suggestion that Richter's role deprived him of trial immunity (Resp. Br. 35 & n.12) is unavailing. "Decisions about indictment or trial prosecution will often involve more than one prosecutor within an office. We do not see how such differences in the pattern of liability among a group of prosecutors in a single office could" affect application of *Imbler*. *Van de Kamp*, 129 S. Ct. at 862. Immunity protects "the proper functioning of the office," not just individual prosecutors. *Ibid.*

Correcting the erroneous ruling below would not alter *Buckley*'s principle that qualified immunity applies where police or prosecutors engage in purely investigative conduct. Respondents make much of the fact that Hrvol at certain times "performed classic police work," including "canvassing the neighborhood" near the crime scene. Resp. Br. 32. But this is beside the point. No one disputes that, had Hrvol performed a warrantless search or assaulted a suspect while he was going door-to-door—in other words, had he committed a tort whose elements did not involve filing criminal charges or participating in a trial—he would have had only qualified immunity. In such a case, the "location of the injury"—the point

where a constitutional right was infringed, giving rise to a present and complete cause of action—would be in the investigation, not the judicial process.

Respondents and their *amici* mistakenly suggest that correcting the erroneous ruling below would create "perverse incentives for unethical prosecutors to exercise their discretion to charge suspects as a means of immunizing misconduct they committed at the pre-indictment stage." Ctr. Admin. Crim. L. Br. 2. An uncharged suspect has no cause of action for an inept or even malicious investigation; his liberty is not imperiled *until* he is charged. Thus there would be no "perverse incentive" to file charges; a prosecutor—or, for that matter, a police officer—has no need to inoculate himself against a lawsuit that could not be brought in the first place.

Respondents argue (at 44) that "an absolutely immune act does not * * * break the chain of liability or preclude damages proximately caused by earlier, non-immune acts whose intent and natural consequence were to cause those damages." But this argues against a straw man. Respondents' claims are precluded not because their murder trials broke a causal chain, but because the prosecutors' absolutely immunized use of testimony at those trials "constitutes an essential element of [their] claim" of wrongful conviction. *Van de Kamp*, 129 S. Ct. at 862.

Respondents argue the *inverse* of *Van de Kamp*: that non-immunized events in a causal chain can negate absolute immunity. But as the United States explains (at 13), "Respondents could not omit from a well-pleaded complaint an allegation that the fabricated evidence was introduced at trial to obtain their convictions; that fact is essential to show the causal

connection between the fabrication and the actual harm they suffered, which was imprisonment on conviction." Respondents have pleaded exactly that. As they told the district court, "success on Harrington and McGhee's claims would necessarily imply that their criminal convictions were invalid." McGhee Dist. Ct. Docket No. 217 at 2.

Similarly, contrary to respondents' characterization, petitioners have never made any argument that acts taken during the judicial process "wash back" or "launder" earlier misconduct. See Resp. Br. 18, 36, 48. The problem in this case is not some imagined claim of retroactive immunity. The problem is that the courts below used the evidence-gathering process, which provided no cause of action, to *prospectively* nullify absolute immunity at a later point when the evidence actually was used. *Van de Kamp* precludes such an outcome.

Respondents argue (at 43) that this Court should simply find a constitutional cause of action based on petitioners' alleged pre-trial conduct, and that it "need not address the question of causation." What respondents actually mean is that the Court should overlook the disjunction between their allegations about the investigation and their pursuit of damages for a wrongful conviction. By factoring out the trial where evidence was actually used, respondents essentially ask this Court to create an inchoate tort, something neither federal nor common law has ever recognized. There is no "attempt" liability in tort law, which requires a cognizable injury for a viable damages claim.

Neither respondents nor their *amici* attempt to defend the causation analysis provided by the courts below. Petitioners' opening brief (at 28-33) explained

why the Second Circuit's *Zahrey* decision, on which the courts below primarily relied, has no support in this Court's § 1983 decisions. *Zahrey* held that a prosecutor should get only the qualified immunity of a police officer if it was "foreseeable" that false evidence he gathered during an investigation would be used in later judicial proceedings. Respondents and their *amici* mention *Zahrey* only in passing, and make no attempt to argue that its novel application of proximate cause can withstand scrutiny. The *Zahrey* court's "theory would import into Section 1983, in an entirely novel way, generalized notions of causation. At the same time, it would disregard specific common law doctrine relevant to the question—namely the tort of malicious prosecution and its limits." SG Br. 14.

IV. RESPONDENTS' THEORY WOULD INVITE A FLOOD OF NEW MERITLESS LITIGATION AGAINST PROSECUTORS.

This Court has acknowledged, candidly and repeatedly, that the rule of absolute immunity involves a "balance of evils" and carries social costs, most notably that it may deprive some genuinely wronged plaintiffs of a recovery from prosecutors.[5] See *Van de Kamp*, 129 S. Ct. at 859; *Imbler*, 424 U.S. at 427. Nonetheless, respondents and their *amici* seek to use this case to challenge *Imbler*'s continued viability, particularly the policy principles the Court articulated to justify absolute immunity. The *Imbler* court observed that almost any defendant who resented his prosecution could ascribe "improper and malicious

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[5] Respondents' separate claims against police officer defendants and the City of Council Bluffs are not at issue in these proceedings.

actions to the State's advocate," and that "if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." 424 U.S. at 425. Respondents nonetheless argue (at 50) that these "floodgates concerns were vastly overstated even before" this Court's decision in *Iqbal*, and that after *Iqbal* they "are wholly misplaced." Some of their *amici* effectively dismiss *Imbler* altogether, noting that prosecutors "are used to court proceedings and are naturally equipped to deal with depositions and document-production." Crim. Def. Lawyers Br. 21.

These arguments fail to account for the fact that respondents have asked the Court to resolve this case by creating a new constitutional "right not to be framed." And even if the Court were to affirm on some other basis, it would work a radical change in the law of immunity. So the proper concern here is the impact of expanding the meaning of due process by allowing a constitutional claim for wrongful conviction to be relocated from trial to investigation.

Respondents' "right not to be framed" by fabrication of testimony would cause an outpouring of new litigation aimed at prosecutors. As respondents describe it, this right would be independent of conviction, damages, or any deprivation of liberty whatsoever. It would apply regardless of whether use of testimony was harmless error; indeed, whether the testimony actually was used *at all* in *any* judicial proceeding. All that would be required is an allegation that prosecutors "fabricate[d] evidence against someone during an investigation with the *intent* to

use that evidence at trial, if necessary." Resp. Br. 24 (emphasis added).

Such a new right would encourage mischief beyond even what the *Imbler* Court envisioned. A prosecutor would face liability anytime a witness recanted testimony and blamed it on undue prosecutorial pressure. A defendant could wield this right to attempt to stop or delay an investigation or prosecution. "[T]he fabrication," respondents say (at 25), "may come to light after the intended victim is arrested but in time to save him from wrongful conviction." Even more alarming, since respondents say the "right not to be framed" should be independent of trial or conviction, such claims would not be barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994). Even a convicted and imprisoned felon apparently could sue claiming that a prosecutor had fabricated evidence and violated his "right not to be framed," notwithstanding other evidence that might have established guilt beyond a reasonable doubt.

Allowing plaintiffs to blame investigative misconduct for their convictions would encourage litigation that had previously been regarded as frivolous, and such suits would no longer be susceptible to ready dismissal. With this case as a precedent, a plausible allegation that a prosecutor had coerced or pressured a witness somewhere outside the judicial process, coupled with a later conviction, would suffice to plead a constitutional violation. Thus, far more wrongful conviction claims would have to be litigated under qualified immunity, and prosecutors would be forced to participate in extended discovery and litigation.

Massive personal liability would turn on questions of fact or intent, and "because an official's state

of mind is 'easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998). Moreover, because fact questions may not be raised on interlocutory appeal, denials of motions to dismiss or summary judgment would not be subject to immediate review. Affirming the decisions below would greatly aggravate the concern this Court expressed in *Imbler* that litigation by convicted defendants could inappropriately divert prosecutors' attention and resources.

* * *

In summary, respondents' proposed "right not to be framed" has no legal foundation, and their immunity arguments are incorrect under this Court's precedents and unsound as a matter of policy. Even if respondents were "genuinely wronged," *Imbler*, 424 U.S. at 427—and there is no basis to draw that conclusion here—that would not give them a special cause of action or exempt them from immunity principles that this Court has consistently reaffirmed.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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